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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DAVID BETTENCOURT, JR., Defendant and Appellant.	H033594 (Santa Clara County Super. Ct. No. CC598328)

I. INTRODUCTION

Defendant Michael David Bettencourt, Jr., appeals from judgment entered after he waived his right to a jury trial and pleaded no contest to one count of felony battery causing serious bodily injury. (Pen. Code, §§ 242, 243, subd. (d).) Defendant contends that his waiver was involuntary because it was given, without the consent of the prosecutor, in exchange for the trial court's promise of a more lenient sentence. (See *People v. Collins* (2001) 26 Cal.4th 297 (*Collins*).) We agree that the plea must be deemed involuntary and, therefore, reverse the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

On or about June 8, 2005, the alleged victim, Heath Condie, entered his former girlfriend's residence where she and defendant, who was her boyfriend at the time, were standing on the balcony. According to Condie's report to the police, defendant, without

[1] We take our recitation of the facts from the transcript of the preliminary hearing.

provocation, punched Condie in the face and head, causing him to suffer a swollen head, two black eyes, a cut lip, and a lacerated left ear requiring nine stitches to close. Condie's former girlfriend told the police that prior to the incident Condie had sent her a text message stating, "come over; I'll whoop his ass."

Defendant was arrested in New Jersey in 2007. He was taken into custody and charged with one count of felony battery causing serious bodily injury, to which defendant pleaded not guilty. On November 6, 2007, he entered into a plea agreement, negotiated with the prosecutor, pursuant to which defendant pleaded no contest to the single felony charged in exchange for his immediate release on his own recognizance and the promise that, if he were to remain out of custody during the time between his release and sentencing, the charge would be reduced to a misdemeanor and he would be placed on court probation.

In May 2008, the prosecutor informed the court that the People had second thoughts about the plea agreement. Since the change of plea hearing the prosecutor had spoken with Condie and his mother and had received new photographs of Condie's injuries. The prosecutor stated that, "in light of the extent of the injuries" he no longer believed the negotiated disposition was appropriate. The court concluded, "in the interest of justice," that the plea was unacceptable, set it aside, and entered a plea of not guilty. The court allowed defendant to remain out of custody. Defendant failed to appear at a subsequent hearing and a warrant was issued for his arrest. He was arrested in New Jersey and returned to custody in August 2008.

At a hearing on October 9, 2008, the prosecutor indicated that he wanted to file an amended information adding a great bodily injury (GBI) allegation, which would make the crime a serious felony for purposes of the three strikes law and preclude its reduction to a misdemeanor. (Pen. Code, §§ 667, 1192.7, subd. (c)(8).) The court asked, "Is there any way we can settle this case without a strike on his record for just the credit time served and probation or something like that?" The prosecutor responded that the People

would not be offering probation. The court insisted that this is a "case that needed to settle." After defendant's attorney informed the court that he did not think the case could settle, the court stated: "What if we were to keep it on the original charges, release him on probation, no more jail and he can apply for a misdemeanor after one year on the matter, and then we can get it worked off his record after that also?"

Addressing defense counsel, the court then asked, "Why don't you talk to him about that. It's my last shot because I don't know what else to do. They're demanding a felony. They have a right to it under these circumstances. [¶] Once it's a strike I can't reduce this thing. I'm trying to deal with the charge we have now. It's a reducible thing after one year." Proceedings occurred off the record. The record picks up with the following colloquy:

"THE COURT: Okay. [¶] The case came before the Court with the charges of Penal Code Section[s] 242[,] 243 [subdivision,] (d), and the People threatened to amend to add other charges or propose, let me use that word, to add other charges, and I had not accepted those at this point.

"I understand he wants to plead to the original charges with the Court offer of pleading to the felony, be eligible for reduction to a misdemeanor in one year, assuming of course that he has completed probation successfully and complied with probation terms, fines and fees, any restitution, et cetera, and has had no contact with the victim, and any other reasonably related terms and conditions. [¶] Then the Court would grant the misdemeanor after one year past the sentencing date.

"Is that your understanding of the Court's proposed resolution first?

"[DEFENSE COUNSEL]: Yes, Judge.

"THE COURT: And, [defendant]?

"[DEFENDANT]: Yes, Your Honor.

"THE COURT: [Prosecutor]?

"[PROSECUTOR]: That's my understanding.

"However, the People are asking the Court to obviously accept the amended information, and we do object to placing [defendant] on probation.

"[Defendant] has failed to return to Court upon the order of the Court, . . . and we don't believe he's going to be an appropriate candidate for probation based upon his willful failures of Court orders.

"THE COURT: To find out it sounds like he wants a misdemeanor, he would be credit time served at the time of sentencing.

"[PROSECUTOR]: For the record . . . [v]ictim suffered approximately nine stitches to his right ear, as well as indicated that he lost consciousness for approximately five to ten seconds.

"We do believe that the GBI allegation is appropriate.

"THE COURT: All right. Well, you should have filed that earlier as well."

The trial court then advised defendant of his rights and the consequences of changing his plea and defendant entered a plea of no contest.

On October 31, 2008, when defendant appeared for sentencing, his attorney told the court that defendant wanted to withdraw his plea. The prosecutor reminded the court that it had "accepted [defendant's] plea over our objection before we were able to file the [amended] information."

Defendant addressed the court, noting, "The main reason I didn't want to take this plea, Your Honor, I'd like it completely thrown out, I don't want to take it at the time when I did agree to the plea bargain, time served . . . . [¶] . . . [¶] . . . [¶] Your Honor, this case, I want it to go to trial as much as possible. Every bit of it, I've come into new light as well, I've also got a hold of a couple more witnesses that I didn't have before that I was able to track down."

The court was incredulous but defendant insisted "this is a self-defense case." He said that at the time he entered his plea, "I felt like I had no other consequence. I was

told I was going to get seven years in prison possibly for this. I was going to get a [Penal Code section] 13--20 [for failure to appear] added on even if I went to trial."

After more discussion, defendant argued that he has had no prior arrests, but, "since I'm such a violent felon that can't be trusted in some . . ." at which point the court interrupted him to state, "I disagree, you aren't a violent felon that can't be trusted. That's why we made the deal for credit for time served and you're out. [¶] If I thought you were a violent felon I would have gone with the DA and tried to, you know. [¶] . . . [¶] . . . I would have let him make his amendment and we would go to trial, you could have gone away for years."

The trial court rejected the motion to withdraw the plea, suspended imposition of sentence and placed defendant on formal probation for three years with a jail term equal to time served. Defendant obtained a certificate of probable cause. (Pen. Code, § 1237.5.) This appeal followed.

III. DISCUSSION

The only issue on appeal is whether defendant's waiver of the right to a trial by jury was coerced in violation of his right to due process. (U.S. Const., 14th Amend.) Defendant argues that because the trial court made an offer of benefits in exchange for his no contest plea, without the consent of the prosecutor, the offer was inherently coercive and defendant's waiver was, therefore, involuntary. The voluntariness of the waiver is a question of law that we review de novo. (*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1660.)

It is well settled that a criminal defendant may waive fundamental rights, including the right to a jury trial. (*Collins, supra*, 26 Cal.4th at p. 305.) "A defendant's waiver of the right to jury trial, as with other fundamental rights, may be accepted by the court only if knowing and intelligent--made with a full awareness of the nature of the right being waived and the consequences of the waiver. In addition, the waiver must be voluntary." (*People v. Smith* (2003) 110 Cal.App.4th 492, 500.)

Criminal defendants often waive the right to trial in connection with plea bargains. The plea bargaining process "contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty [or no contest] in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. [Citation.] This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment [citation], by the People's acceptance of a plea to a lesser offense than that charged, either in degree [citations] or kind [citation], or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the 'bargain' worked out by the defense and prosecution. [Citations.] But implicit in all of this is a process of 'bargaining' between the adverse parties to the case--the People represented by the prosecutor on one side, the defendant represented by his counsel on the other--which bargaining results in an agreement between them." (*People v. Orin* (1975) 13 Cal.3d 937, 942-943 (*Orin*).)

While plea bargaining is an acceptable method of resolving criminal cases, only the prosecutor is authorized to negotiate a plea agreement on behalf of the state. "[T]he court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of 'plea bargaining' to 'agree' to a disposition of the case over prosecutorial objection. Such judicial activity would contravene express statutory provisions requiring the prosecutor's consent to the proposed disposition, would detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge's participation in the matter." (*Orin, supra,* 13 Cal.3d at p. 943, fn. omitted.)

In *Collins*, the trial court told the defendant that by waiving a jury he would be " '*getting some benefit*.' " (*Collins, supra*, 26 Cal.4th at p. 302.) The Supreme Court held that, in making the comment, the trial court violated its obligation to remain neutral in assessing the voluntariness of the defendant's waiver. The comment also implied that the defendant would be treated more harshly if he were to insist upon a jury trial. "In effect, the trial court offered to reward defendant for refraining from the exercise of a constitutional right." (*Id.* at p. 309.) "The circumstance that the trial court did not specify the nature of the benefit by making a promise of a particular mitigation in sentence, or other reward, does not negate the coercive effect of the court's assurances. The inducement offered by the trial court to defendant, to persuade him to waive his fundamental right to a jury trial, violated defendant's right to due process of law." (*Ibid.*) Here, as in *Collins*, the trial court induced defendant to enter a no contest plea by offering the specified benefits of probation, release from jail, and reduction of the crime to a misdemeanor. In offering the benefits, the trial court strayed from its role as a neutral evaluator of the voluntariness of defendant's plea and effectively coerced the result.

The Attorney General counters that the trial court did not offer to reward defendant for the plea because the court did not reduce or dismiss the pending charge. According to the Attorney General, the trial court merely gave defendant an "indicated sentence," which did not require the consent of the prosecutor and did not promise any benefit. It is true that there is no requirement that the People consent to a guilty or no contest plea. (*People v. Vessell* (1995) 36 Cal.App.4th 285, 296.) Where a defendant voluntarily pleads guilty or no contest to all charges and the trial court informs the defendant what sentence will be imposed, no bargaining takes place because no benefits are offered in exchange. (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516.) The court merely indicates what sentence it will impose regardless of whether guilt is determined by a jury or admitted by the plea. (*People v. Turner* (2004) 34 Cal.4th 406, 418.)

This case does not involve an indicated sentence. Even a cursory reading of the transcript reveals that the trial court was attempting to settle the case short of trial. There is no suggestion that the court intended to impose the same sentence if the matter went to trial. To the contrary, the court stated, in reference to the prosecutor's proposed GBI amendment, that the People had "a right to it under these circumstances" and that the court had not accepted it "at this point," suggesting that, if defendant declined the deal, the crime would be charged and tried as a serious felony, which would preclude its reduction to a misdemeanor. Thus, the court's proposed sentence was presented as a benefit--a more lenient sentence than that which defendant could expect if convicted after a trial.

The trial court itself recognized that the sentence it proposed was designed to induce defendant to admit the charge and waive his right to a jury trial. The court referred to the proposed sentence as the court's "proposed resolution," and noted that it was "the Court offer" to make defendant "eligible for reduction" of the felony to a misdemeanor. When defendant thereafter asked to withdraw the plea, the court again acknowledged, "[W]e made the deal."

Although we recognize that the trial court's motive was not to deprive defendant of his constitutional right to a jury trial, by offering to benefit defendant with a more lenient sentence if he pleaded to the charges then and there and forego his right to a jury trial, the trial court in effect "offered to reward defendant for refraining from the exercise of a constitutional right." (*Collins*, *supra*, 26 Cal.4th at p. 309.) However well intentioned, the offer violated the court's obligation to remain neutral and effectively coerced defendant into entering the plea. This is a structural defect in the proceedings warranting reversal without a determination of prejudice. (*Id.* at pp. 312-313.)

IV. DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with instructions to allow defendant, if he chooses to do so, to withdraw his plea of no contest.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.